NO. 49138-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

Galaxy Theatres, LLC,

Appellant,

v.

Gregorio Garza and Lizbeth Garza,

Respondents.

Reply Brief of Appellant Galaxy Theatres, LLC

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I. SUMMARY OF ARGUMENT

The Garzas failed to present sufficient evidence to the trial court to justify the entry of the default judgment against Galaxy Theatres. Under well-established Washington law the trial court should not have entered the default judgment in the absence of such proof and the trial court erred in denying Galaxy Theatres' request to vacate the judgment under CR 60(b)(11). The Garzas cannot cure the defects in their evidence through the submission of post-judgment proof.

The judgment should also be vacated under CR 60(b)(9) because a non-culpable event resulted in an unavoidable casualty or misfortune. The Garzas misconstrue Galaxy Theatres' argument as one of mistake but no culpable conduct was involved. Instead, a reliable method of transmitting information failed, which prevented Galaxy Theatres from appearing and defending in this lawsuit—a circumstance which the Garzas' counsel admitted was "a strange thing." CP at 516.

The Garzas' attempts to argue that Galaxy Theatres is barred from vacating the default judgment are inappropriate. Galaxy Theatres is not barred by the doctrines of judicial estoppel or judicial admission because liability is concededly a legal conclusion to which neither doctrine applies. Finally, the Garzas' new timeliness argument is being presented for the

first time on appeal. Having never presented, briefed, or argued the issue to the trial court, the Garzas are barred from asserting such an argument.

II. ARGUMENT

A. The Judgment Should be Vacated under CR 60(b)(11) because The Garzas Failed to Present Facts Sufficient to Establish Their Claim.

The trial court should have vacated the default order and judgment under CR 60(b)(11) because the Garzas failed to set forth sufficient facts to support their claim. As an initial matter, *Caouette* and *Kaye* are dispositive and controlling. The Garzas' attempt to avoid this binding authority fails on its face. Recognizing they are subject to the rule announced in these cases, the Garzas then attempt to demonstrate they presented sufficient evidence to support the entry of the default judgment. However, this argument only highlights the inadequacy of the evidence submitted. Finally, the Garzas argue they can rely on evidence submitted after the entry of default. However, such a rule contradicts *Caouette* and *Kaye* and leads to illogical and unfair results.

1. *Caouette* and *Kaye* are controlling and dispositive.

The Garzas mistakenly argue that *Caouette* and *Kaye* are factually dissimilar to this case and that this Court wrongly decided *Caouette*. Both arguments are specious. To the contrary, *Caouette* and *Kaye* are binding and conclusive and *Caouette* is good law.

In support of their argument that *Caouette* and *Kaye* are dissimilar the Garzas assert that:

> The facts in *Kaye* and *Caouette* are distinguishable from the facts in our case. The plaintiff in *Kaye* failed to present any factual basis to support her claim. Similarly, in *Caouette*, the plaintiff failed to plead sufficient facts supporting a necessary element *and* failed to provide any facts in support of that element in her supporting affidavit.

Respondent's Brief at p. 26 (emphasis in original). However, the failure to plead and present a factual basis to support the Garzas' claim is exactly what occurred in this case. Indeed, the Garzas' attempt to minimize the similarities between this case and *Caouette* and *Kaye* is telling.

In *Caouette*, the plaintiff failed to submit facts that would support an element of the plaintiff's claim. In an attempt to save her claim, the plaintiff argued that she could rely on the unanswered allegations in her complaint. This Court disagreed, stating "[i]t would be inequitable to allow the judgment to stand on a mere allegation" "particularly where, as here, the plaintiff submitted an affidavit in support of the judgment that failed to support the allegation in the complaint." *Caouette*, 71 Wn. App. 69, 79, 856 P.2d 725 (1993).

Similarly, in *Kaye*, the trial court refused to enter a default judgment where the party seeking the default judgment failed to set forth facts supporting each element of their claim. The court emphasized the

role of the trial court as gatekeeper, stating: "[w]hether proceeding pursuant to a motion for default or on a fully litigated motion, the trial court must analyze whether the facts support the plaintiff's claim for relief." *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 331, 242 P.3d 27 (2010). The analysis applied by the courts in *Caouette*, *Kaye*, and their progeny are wholly applicable to this case.

Further, the Garzas' argument that this Court wrongly decided *Caouette* is incorrect. Assuming for the sake of argument that *Caouette* extended the Court's holding in *State v. Scott*, 92 Wn.2d 209, 595 P.2d 549 (1979), which it did not, the Garzas cite no authority for the proposition that an extension of the law is inappropriate. In any event, the Court's analysis in *Caouette* has repeatedly found support from other divisions of this court. *See Kaye*, 158 Wn. App. 320; *Friebe v. Supancheck*, 98 Wn. App. 260, 992 P.2d 1014 (1999). *Caouette* is good law.

2. The Garzas' failed to present sufficient evidence to support their claim.

Recognizing that *Caouette* and *Kaye* control the outcome of this case, the Garzas' allege they presented sufficient factual evidence to support their claim. However, the Garzas' argument only highlights the deficiencies in the factual evidence upon which they attempt to rely.

First, the Garzas point to two allegations in their Complaint which they apparently concede are the only allegations in the Complaint supposedly connecting Galaxy Theatres to the premises. In the "Status of Parties" subsection of the Complaint, the Garzas allege that "Defendant Galaxy Theatres, LLC . . . is a company doing business in the State of Washington . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is [sic] the location where the subject incident occurred." CP at 2. The Garzas additionally assert that they "reported the incident to the manager on duty." CP at 3. These allegations are facially insufficient to demonstrate Galaxy Theatres possessed or controlled the premises and are factually unsupported by substantial evidence.[1]

"Doing business at" a location is not sufficient to demonstrate possession or control. For example, the law firm of Montgomery Purdue Blankinship & Austin, PLLC (MPBA) does business at the Columbia Tower. MPBA does not control it. With respect to the Garzas' allegation that they reported the incident to the manager on duty, the allegation does not even state who employed the manager. These allegations fail to demonstrate Galaxy Theatres controlled the premises.

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[1] Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Second, the Garzas' attempt to identify factual support for their claim in the declarations submitted to the trial court further underscores the deficiencies in the Garzas' evidence. The Garzas allege:

- A manager provided the Garzas a business card after the incident. Respondent's Brief at p. 24-25;
- The manager instructed the Garzas that someone from Galaxy Theatres' corporate office would contact the Garzas. Respondent's Brief at p. 25;
- The manager later instructed the Garzas to submit medical bills to her. Respondent's Brief at p. 25; and
- The manager and Pamela Bush, a Galaxy Theatres employee, share an email address with the same domain name. Respondent's Brief at p. 25.

These factual allegations likewise fail to demonstrate Galaxy Theatres controlled the premises.

As an initial matter, the Garzas do not identify by whom the manager is employed. In the declaration upon which the Garzas rely, the Garzas identify the manager as being the manager of "Gig Harbor Uptown Galaxy." In the email to which the Garzas refer—which demonstrates a shared domain name—the signature block lists the manager as an employee of "Galaxy Uptown." A shared domain name with Google or

Yahoo cannot be sufficient to establish possession, ownership, or control of property owned by these entities. This is particularly true where, as is the case here, the factual support cited by the Garzas is ambiguous.

Finally, the Garzas' failure to submit any testimony regarding Galaxy Theatres' relationship to the premises is compounded by the fact that the Garzas submitted declarations and testified at the hearing for the entry of judgment but failed to establish an element of their claim. CP at 512-35. "It would be inequitable to allow the judgment to stand on a mere allegation . . . particularly where, as here, the plaintiff[s] submitted an affidavit in support of the judgment that failed to support the allegation." *Caouette*, 71 Wn. App. at 79. The factual support cited to by the Garzas demonstrates the Garzas failed to set forth facts sufficient to establish their claim. The trial court abused its discretion by declining to grant Galaxy Theatres' motion to vacate.

3. Consideration of facts submitted after the entry of the judgment contradicts binding authority and leads to illogical and unfair results.

Finally, the Garzas mistakenly argue that they should be allowed to rely on evidence and testimony submitted after entry of the default judgment to support the entry of the default in the first place. Such an argument is in conflict with *Caouette* and *Kaye* and leads to illogical and unfair results.

Both *Caouette* and *Kaye* recognize that "prior to entering a default judgment, the trial court must assess both its jurisdiction and the sufficiency of the complaint." *Kaye*, 158 Wn. App. at 330 (underline added); *see also Caouette*, 71 Wn. App. at 79 (noting that the trial court had no evidence to support plaintiff's claim and that entry of the judgment was therefore not justified). The Garzas' argument that they can rely on evidence submitted *post hoc* eviscerates the requirement that a trial court have sufficient evidence to support a claim before entry of a default.

Further, the Garzas' argument leads to unfair results. If the Garzas could cure their deficiency after entry of the judgment, the trial court would effectively allow the Garzas to present their case on the merits but deny Galaxy Theatres the same opportunity. Such a result would be fundamentally inequitable. The proper procedure is to deny entry of the default judgment (*Kaye*) or, if default has already been entered, vacate the judgment and allow both parties to present evidence at trial (*Caouette*). The Garzas cannot rely on the submission of post-judgment evidence to support the entry of their default judgment in the first place.

In sum, *Caouette* and *Kaye* are controlling and the Garzas failed to present sufficient evidence to demonstrate Galaxy Theatres possessed, owned, or controlled the premises. Indeed, "[n]owhere in the materials that [the Garzas] submitted in support of [their] judgment did [they] set

forth facts that would support a finding that" Galaxy Theatres owed the Garzas a duty of care as the possessor of the premises. *Id.* at 78. The Garzas cannot cure this deficiency by relying on the submission of post-judgment evidence. The trial court abused its discretion in denying Galaxy Theatres' motion to vacate because the default judgment is based upon "incomplete, incorrect or conclusory factual information" and should have been vacated pursuant to CR 60(b)(11).

B. The Judgment Should be Vacated Under CR 60(b)(9) for Unavoidable Casualty or Misfortune.

The Garzas mistakenly argue that CR 60(b)(9) is subject to the one-year bar rule and that a registered agent's failure to forward information does not satisfy CR 60(b)(1). These are red herrings which confuse Galaxy Theatres' argument. Under the express terms of CR 60(b) unavoidable casualty or misfortune arguments are not subject to a one-year bar. Further, Galaxy Theatres does not argue that a "mistake" occurred (as the Garzas allege), but rather that a non-culpable event resulted in an unavoidable casualty or misfortune.

1. Unavoidable casualty or misfortune arguments are not subject to the one-year time bar.

CR 60(b) provides that a motion to vacate "shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment . . . " Under the plain language of the rule, a motion based

on CR 60(b)(9) is not subject to the one-year time bar. The Garzas' attempt to argue to the contrary is meritless.

2. The failure of a reliable system of communication constitutes an unavoidable casualty or misfortune.

The Garzas evasively argue that once a registered agent receives service of process, a principal's failure to receive notice of the lawsuit requires a mistake. In support of this position the Garzas cite *Brooks v. University City, Inc.*, 154 Wn. App. 474, 225 P.3d 489 (2010) and *Prest v. American Bankers Life Assur. Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995). The Garzas' argument and authority are inapposite.

To clarify, for the purposes of this appeal, Galaxy Theatres is not arguing that its registered agent failed to forward the summons and complaint to Galaxy Theatres. Instead, Galaxy Theatres argues that an email system failure caused the transmission of the summons and complaint to Galaxy Theatres to fail. Fairchild Records (Galaxy Theatres' registered agent) claims it forwarded service to Galaxy Theatres. However, an extensive review of Galaxy Theatres' email servers demonstrates Galaxy Theatres never received the alleged email. Under these circumstances no mistake occurred: the registered agent forwarded service of process and Galaxy Theatres never received notice due to a

failure in the email system. These circumstances highlight the inapplicability of the authority cited by the Garzas.

In *Prest* the plaintiff brought a claim against her insurance company. Per applicable statutes, the plaintiff served the insurer with the summons and complaint by serving the Office of the Insurance Commissioner. The Insurance Commissioner then sent the summons and complaint by certified mail to the person designated by the insurance company to receive process. The summons and complaint were delivered by mail to the insurance company and the return receipt was signed. However, the person designated to receive the notice had changed jobs and was out of the office for a significant period of time when the summons and complaint were delivered. By the time the summons and complaint reached the correct individual at the insurance company, the default judgment had already been entered.

The insurance company moved to vacate the judgment under CR 60(b)(1) arguing that the failure to appear was due to "mistake, inadvertence and/or excusable neglect." This Court held that the company's neglect was not excusable. *Prest*, 79 Wn. App. at 99.

Prest involves culpable conduct. The insurance company's internal practices resulted in the insurance company not taking action, despite having received the summons and complaint. The Court in *Prest*

did not analyze what constitutes "unavoidable casualty or misfortune" under CR 60(b)(9) but instead applied the "excusable neglect" standard under CR 60(b)(1). The court's analysis in *Prest* is inapplicable.

Here, Galaxy Theatres' argues that the failure of an email system to deliver a communication constitutes an unavoidable casualty or misfortune. Contrary to the excusable neglect standard, unavoidable casualty or misfortune addresses forces outside the control of the defendant and concerns whether the defendant should be forced to bear the negative consequences of an occurrence the defendant could not have reasonably avoided or anticipated.

Brooks did not apply or discuss CR 60, let alone CR 60(b)(9). In *Brooks*, the defendant sought to vacate the default order under CR 55(c)(1) arguing that the defendant did not appear earlier because its registered agent mistakenly forwarded the summons and default order to the wrong employee. *Brooks*, 154 Wn. App. at 477. The defendant sought to overturn the default judgment under CR 55(f)(1) which required the plaintiff to give notice to the employer of the hearing to enter the default judgment because more than a year had passed since service of process. The Court of Appeals set aside the default judgment because the plaintiff failed to comply with CR 55(f)(1).

However, the Court of Appeals affirmed the entry of the *order of default*. Under CR 55(c)(1) the trial court may set aside an order of default for "a showing of good cause *i.e.*, excusable neglect and due diligence." *Brooks*, 154 Wn. App. at 479. The Court found that the transmission of the summons and complaint by the registered agent to the *wrong person* at the employer did not meet the excusable neglect standard. *Brooks*, 154 Wn. App. at ¶ 15, 478.

In the present case, Galaxy Theatres does not argue that its registered agent mistakenly sent the summons and complaint to the wrong person. As noted above, it was the failure of a reliable source of communication which disrupted Galaxy Theatres' receipt of the summons and complaint, and resulted in an unavoidable casualty or misfortune under CR 60(b)(9). This was a non-culpable event—not a mistake, not inadvertence. *Brooks* is inapposite.

In this case, unlike both *Brooks* and *Prest*, no one at Galaxy Theatres received the summons and complaint. The unrebutted testimony of an outside technology consultant demonstrates that Galaxy Theatres' email system never received the email containing the summons and

complaint.[2] Galaxy Theatres should not be forced to bear the consequences of an occurrence which it could not have anticipated.

In support of this argument Galaxy Theatres cites *Kellog v. Smith*, 171 Okla. 355, 42 P.2d 493, 496 (1935), which the Garzas notably failed to distinguish. In *Kellog* the court found the miscarriage of a pleading in the mail constituted an unavoidable casualty or misfortune sufficient to vacate a judgment under an analysis substantially similar to CR 60(b)(9): "For unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Okla. Stat. Ann. tit. 12, § 1031(7) (formerly §556, O.S. 1931). The miscarriage of a pleading sent via email, a reliable communication system, should likewise constitute an unavoidable casualty or misfortune justifying the vacation of a default judgment under CR 60(b)(9). The trial court abused its discretion in holding to the contrary.

C. Galaxy Theatres Presented a Defense to the Garzas' Claims.

The Garzas mistakenly argue that Galaxy Theatres failed to present a defense to the Garzas' claims under CR 60(e)(1) because Galaxy Theatres did attempt to prove that it did not owe the Garzas a duty of care.

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[2] CP 536 – 541.

The Garzas' argument is misplaced and inappropriately reverses the burden of proof.

1. The failure of the Garzas to meet their burden of proof is a defense.

The Garzas' failure to support each element of their claim is the defense. It is elementary that a plaintiff must prove each element of its claim to prevail. *See, e.g., Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (the absence of evidence to support the plaintiff's case is a defense). An analogous circumstance arises where a party successfully moves for a judgment notwithstanding the verdict. *See* CR 50(a) ("If . . . a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find . . . for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim.").

In our case, the Garzas failed to establish Galaxy Theatres owed the Garzas a duty of care—an essential element of their tort claim. This is a complete defense. The fact that this is a complete defense is further supported by the fact that the court in *Caouette* did not analyze whether there was an additional, independent defense to the plaintiff's claim under CR 60(b)(11). Galaxy Theatres is not additionally obligated to attempt to

disprove that it did not owe the Garzas a duty of care. Galaxy Theatres presented a defense to the Garzas' claim.

2. The Garzas' argument improperly reverses the burden of proof.

Moreover, the Garzas' argument would result in an inappropriate flipping of the burden of proof. The *plaintiff* must introduce evidence to support every element of their claim. 14A WASH. PRAC., *Civil Procedure – Burden of Proof* § 30:13 (2d ed.). Here, however, the Garzas argue Galaxy Theatres must prove that it did not owe the Garzas a duty of care. This is a perversion of the burden of proof which cannot cure the Garzas' lack of support for their claim. Indeed, Washington courts have recognized that "the lack of affirmative proof of a vital fact may not be cured by the opposing litigant's failure to prove the negative thereof." *Emerick v. Bush*, 36 Wn.2d 759, 763, 220 P.2d 340, 342 (1950). Galaxy Theatres presented a meritorious defense to the Garzas' claim and the Garzas' attempt at reversing the burden of proof is inappropriate.

D. The Garzas' CR 60(e) Timeliness Argument is Barred Because the Garzas Raise the Issue for the First Time on Appeal.

The Garzas are barred from arguing that Galaxy Theatres' Motion to Vacate was untimely because they raise the issue for the first time on appeal. It is black letter law in Washington that an appellate court generally "will not review an issue, theory, argument, or claim of error not

presented at the trial court level." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6, 21 (2014) (citing *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001)). This is because "[a] party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error." *Id.* (citing *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P.2d 351 (1983)). A party's "[f]ailure to do so precludes raising the error on appeal." *Id.* And "[w]hile an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." *Id.* (citing *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012)). These principles are well-established.

Here, the Garzas failed to argue that Galaxy Theatres' motion to vacate was untimely to the trial court. The Garzas made no mention of timeliness in their response to Galaxy Theatres' motion to vacate, and presented absolutely no timeliness argument to the trial court during oral argument. Indeed, the Garzas failed to inform the trial court of the law which the Garzas wished the trial court would apply. Instead, the Garzas attempt to argue, for the first time on appeal, that Galaxy Theatres' motion to vacate was untimely. This they cannot do. The Garzas' timeliness argument is barred under the well-established rule that an appellate court will not consider an issue for the first time on appeal.

However, even if the Garzas could raise their timeliness argument for the first time on appeal, which they cannot, Galaxy Theatres' motion was timely. "The critical period in determining whether a time is reasonable is the time between learning of the default judgment and filing the CR 60 motion." *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 308, 863 P.2d 1377 (1993). Here, Galaxy Theatres received notice of the default on March 30, 2016, after the Garzas strategically waited over a year to notify Galaxy Theatres of the default judgment. Just over a month later, Galaxy Theatres moved to set aside the amount of damages (which was denied); subsequently retained new counsel; appealed the court's denial of its motion to set aside the amount of damages; and brought a motion to vacate the judgment entirely. Galaxy Theatres has acted diligently since learning of the default judgment and moved to vacate within a reasonable time in accordance with CR 60(b).

E. Galaxy Theatres' Positions are Not Inconsistent and are Not Barred by the Doctrine of Judicial Estoppel.

The Garzas allege that Galaxy Theatres' positions are inconsistent and that doctrine of judicial estoppel bars Galaxy Theatres from arguing liability because Galaxy Theatres did not contest liability in its motion to set aside the amount of damages. In support of this argument the Garzas misleadingly state that Galaxy Theatres "admitted" liability and that it is

now inconsistent to contest liability. See Respondent's Brief at p. 15-20. To be clear, Galaxy Theatres did not admit liability. The Garzas fail to recognize the distinction between an admission and arguing in the alternative.

In support of their misleading argument, the Garzas cite to statements made during oral argument on Galaxy Theatres' motion to set aside the amount of damages. However, these citations demonstrate that Galaxy Theatres did not admit liability. Indeed, the quote upon which the Garzas heavily rely, states: "Galaxy has conceded, made a heavy concession that we're not asking to have the entire judgment vacated . . . We're just talking about damages." Respondent's Brief at p. 7 (underline added). Galaxy Theatres did not state "we admit liability," and the Garzas cite no authority for the proposition that a party cannot argue in the alternative. Regardless, even if Galaxy Theatres admitted liability (which it did not), the doctrine of judicial estoppel is inapplicable.

As an initial matter, the Garzas appear to concede judicial estoppel applies only to facts and not legal conclusions. However, the Garzas incorrectly argue that liability is a fact not a legal conclusion and that Galaxy Theatres' liability argument is subject to the doctrine of judicial estoppel. The Garzas are mistaken.

> A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517, 519 (1988). Liability is not a thing that really exists. Instead, it is a conclusion which is reached after applying law to facts:

> Negligence and proximate cause are legal conclusions and are matters usually reserved for the jury . . . Contributory negligence, like negligence, is a legal conclusion usually reserved for the jury.

Thompson v. King Feed & Nutrition Serv., Inc., 153 Wn.2d 447, 474, 105 P.3d 378 (2005).

The case relied on by the Garzas, *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 108 P.3d 147 (2005), is not to the contrary. The fact at issue in *Cunningham* was whether the plaintiff previously disclosed the existence of a personal injury claim to the bankruptcy court. In that case, the debtor did not list his personal injury claim as an asset; the trustee determined the estate was a "no asset" matter; and the bankruptcy court granted a discharge without issuing a dividend to creditors. Immediately thereafter the debtor filed his personal injury claim. The court held the debtor was judicially estopped from bringing his personal injury claim based on his prior omission of the fact that the claim existed.

Despite being factually inapposite, the analysis in *Cunningham* is inapplicable to this case. *Cunningham* analyzed an inconsistent factual

statement dealing with the existence of a claim; a thing that does or does not exist. In contrast, not contesting liability is a legal position. Galaxy Theatres did not state that it owned, controlled, or operated the premises. It simply did not contest liability. Litigants should not be required to premise every alternative legal theory with qualifying statements that they are "arguing in the alternative," or that "for the purposes of this argument only, the litigant is not contesting liability." A rule to the contrary would be senseless and place form over substance. Galaxy Theatres' legal positions are not inconsistent and are not barred by the doctrine of judicial estoppel.

F. Galaxy Theatres Did Not Concede Liability and is Not Barred by the Doctrine of Judicial Admission.

The Garzas mistakenly assert Galaxy Theatres conceded liability and that Galaxy Theatres is barred from challenging liability under the judicial admission doctrine. The Garzas' argument is misleading and incorrect. Galaxy Theatres did not concede liability. As noted above, the citations in the Garzas' response brief demonstrate no admission of liability occurred. Regardless, even if Galaxy Theatres admitted liability, which it did not, the doctrine of judicial admission does not apply.

While judicial estoppel is grounded in the preservation of the credibility of the judicial process itself, the judicial admission doctrine is

grounded in the law of evidence.[3] A judicial admission is a formal statement made in the course of a judicial proceeding which withdraws a fact from issue and relieves the opposing party of even having to present proof of the fact. "[A] fact that is judicially admitted is no longer a fact at issue in the case – the party making the judicial admission has conceded to it." Ediberto Roman *"Your Honor What I Meant to State was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law*, 22 Pepp. L. Rev. 3, 986 (1995). Judicial admissions are limited to admission of facts, not legal arguments. *Hogenson v. Service Armament Co.*, 77 Wn.2d 209, 214, 461 P.2d 311 (1969). It is presumed a lawyer does not make a judicial admission during argument. *Francis v. Pountney*, 972 P.2d 143, 147 (Wyo. 1999).

Here, Galaxy Theatres made a legal argument based on *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) which holds that a party may vacate an award of damages even when the party does not present a

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[3] The concept of a judicial admission rests on the premise that any statement made by a party can subsequently be used against that party. There are two types of factual admissions that an attorney can make: a judicial admission or an evidentiary admission. The principal difference between the two is that evidentiary admissions are evidence but are not binding while judicial admissions are binding on the party making the admission. In other words, a judicial admission is not evidence at all. It simply withdraws a fact from contention. Karl B. Tegland, 5B WASH. PRAC., *Evidence Law and Practice* § 801.53 (6th ed.).

liability defense. As such, Galaxy Theatres did not *contest* liability in its motion to set aside the amount of damages. This is not an admission of fact, particularly where it is *presumed* that an attorney does not make a judicial admission during argument.

Nevertheless, in support of their argument the Garzas cite *Fite v. Lee*. However, *Fite* does not change this result. In *Fite*, the court applied the judicial admission doctrine to the facts giving rise to liability, as opposed to liability itself (which again, is a legal conclusion—not a factual statement). The attorney in *Fite* admitted that he had no additional evidence to support his client's claim, that as a result the other party was not liable, and that he did not oppose entry of summary judgment in the opposing party's favor. *Fite v. Lee*, 11 Wn. App. 21, 31, 521 P.2d 964 (1974).

Here, unlike *Fite*, the purported 'admission of liability' was based entirely on counsel for Galaxy Theatres' argument concerning legal principles, as opposed to facts. Galaxy Theatres' counsel merely identified for the court that Galaxy Theatres was not presenting a defense to liability. This is different than admitting facts which would establish liability. Galaxy Theatres' legal argument is not a fact, and does not constitute a judicial admission. As such, Galaxy Theatres' arguments are not barred by the doctrine of judicial admission.

III. CONCLUSION

Under well-established law the default judgment should be vacated. *Caouette*, 71 Wn. App. at 79. Indeed, the judgment should not have been entered in the first place. *Kaye*, 158 Wn. App. at 334. The Garzas failed to provide factual support for each element of their claim, which is fatal to the entry of a default judgment. A default judgment which rests upon such a defect challenges the integrity of the court and frustrates the court's role as gatekeeper. The trial court erred in denying Galaxy Theatres' Motion to Vacate under CR 60(b)(11).

Similarly, and separately, the default judgment should have been vacated pursuant to CR 60(b)(9). The failure of a reliable source of communication, such as the postal system or an email system, constitutes an unavoidable casualty. Galaxy Theatres is not at fault for an email system's failure. The trial court erred in denying Galaxy Theatres' Motion to Vacate under CR 60(b)(9).

Finally, the Garzas' attempts at barring Galaxy Theatres from making these arguments are inappropriate and demonstrative of the fact that the Garzas failed to present sufficient evidence in support of the default judgment. Galaxy Theatres did not admit liability, the doctrines of judicial admission and judicial estoppel are inapplicable, and the Garzas cannot raise a new issue for the first time on appeal. The default judgment

against Galaxy Theatres should have been vacated and the trial court abused its discretion in holding to the contrary.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 21, 2017, I sent via legal messenger, messenger fees paid, a true and correct copy of the foregoing Reply Brief of Appellant Galaxy Theatres, LLC addressed to:

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DATED this 21st day of April, 2017, at Seattle, Washington.

Verna M. Garton